# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-1712

IN RE GRAND JURY SUBPOENA SERVED UPON SIMON HOROWITZ

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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The petition for a writ of certiorari in this case challenges a holding of the Court of Appeals for the Second Circuit rejecting petitioners' claim that the production of subpoenaed documents would violate their privilege against self-incrimination. On June 18, 1973, petitioners filed an application for a stay, which asserted that "a denial of this application will not merely work irreparable injury on petitioners' Fifth Amendment rights, but will also entirely moot the certiorari petition and defeat the jurisdiction of this Court" (Application A-1273, p. 6).

The application for a stay was denied on June 25, 1973. After being advised by the United States Attorney that the subpoenaed documents had been turned over to the grand jury, and accepting the accuracy of the representation made to the Court in the stay application, we directed the attention of the Court to petitioners' suggestion that the denial of the stay would "entirely moot" the petition for certiorari. Petitioners now argue

in their Reply Memorandum that the denial of the stay has not rendered the petition "entirely" moot. They rely on the fact that a certain group of pre-1966 documents were not required to be turned over to the grand jury immediately, but require further application to the district court.

After receiving the Reply Memorandum, which abandoned altogether the mootness suggestion advanced by petitioners when seeking a stay, we again communicated with the United States Attorney. He advises that petitioners' representation regarding the pre-1966 documents is correct, and that it is very likely that the grand jury may seek to examine these documents. Accordingly, it now appears that the issue is not, and was never, in danger of being "entirely moot."

In the circumstances, we no longer contend that the case is moot. We still urge, however, for the reasons stated in Chief Judge Friendly's opinion, that the decision below is correct and that the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

SEPTEMBER 1973.

DOJ-1973-09